Supreme Court, U.S.
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No. 95-212

In The

Supreme Court of the United States

October Term, 1995

DONNA FRED,

Petitioner,

vs.

WACKENHUT CORPORATION AND
OMAHA PUBLIC POWER DISTRICT,

Respondents.

**On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals
For The Eighth Circuit**

BRIEF OF RESPONDENT OMAHA PUBLIC POWER DISTRICT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner has presented three issues for review. First, she claims that the district court's decision, and the affirmance of that decision by the Eighth Circuit Court of Appeals, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Second, Petitioner claims that the district court and the court of appeals have created new and erroneous law allegedly allowing Respondents to rely on the Petitioner's mental state as a basis for their decision to suspend and terminate her when, in the Petitioner's opinion, such mental state was brought on by the underlying sexual harassment.

Third, Petitioner claims that the district court's finding that prompt effective remedial action was taken with regard to the single event which was credited by the Court was not, in fact, prompt and effective remedial action.

Pursuant to Sup. Ct. R. 15, Respondent OPPD notes that there are numerous misstatements, not only of the facts, but of the nature and effect of the findings of the district court. Those misstatements will be addressed in some detail in the Statement of the Case. Regardless, each of the three questions presented, when Petitioner's argument is examined, amount to no more than Petitioner's disagreement with the specific credibility determinations and findings of fact made by the district court and affirmed by the court of appeals.

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In a decision reported at 860 F. Supp. 1401 (D. Neb. 1994), the Honorable Lyle E. Strom, then Chief United States District Judge for the District of Nebraska, following a trial to the court, found in favor of Respondents, and against Plaintiff/Petitioner. Petitioner filed a Notice of Appeal on September 14, 1994, and following oral argument, the Eighth Circuit Court of Appeals rendered its per curiam decision (unpublished) on May 4, 1995,

affirming the decision of the district court. *Fred v. Wackenhut*, 53 F.3d 335 (8th Cir. 1995).

The Petition for Writ of Certiorari was timely filed by Petitioner on August 1, 1995. Respondent acknowledges the jurisdiction of this Court to review the Petition for Writ of Certiorari, and does not dispute the Petitioner's Statement of Statutes Involved.

Respondent does note that the appendices to the Petition do contain the relevant opinions; however, there are numerous typographical errors within those reproduced opinions. None of those typographical errors affect, however, the substance of the opinions, which, in the case of the district court opinion, is separately published.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition of Case Below

This case, alleging hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* as amended, began with the filing of an administrative charge of discrimination with the Nebraska Equal Opportunity Commission and the federal Equal Employment Opportunity Commission. Those charges of discrimination set forth a total of four instances of alleged sexual harassment. That list of allegations grew significantly from that time until the time of the filing of the original Complaint in this matter on November 9, 1991. Thereafter, allegations regarding

instances of sexual harassment continued to grow during the discovery process, during trial in this matter, and, in fact, there were even issues of harassment raised for the first time on appeal before the Eighth Circuit Court of Appeals.

The trial commenced on July 5, 1994, continued on July 6 through 8, July 11 through 13, and August 1 through 2 and concluded on August 2, 1994. On August 15, 1994, the district court rendered its decision in favor of the Defendants Wackenhut and OPPD. Plaintiff filed a Notice of Appeal on September 14, 1994, and on May 4, 1995, the Eighth Circuit Court of Appeals held, in an unpublished per curiam opinion:

> After a bench trial, the district court rejected Donna Fred's Title VII hostile environment claim based on sexual harassment. On appeal, Fred argues that most of the district court findings are clearly erroneous. Because the controlling law is clear, our review satisfies us that an opinion would have no precedential value in this fact-intensive case. We further conclude the district court's fact findings are not clearly erroneous and no error of law appears. We thus affirm the judgment of the district court. See Eighth Circuit R. 47B.

Petitioner's Appendix B.

Petitioner now seeks review of this Court with the basic premise being, once again, that the trial court erred in its findings of fact; an issue specifically reviewed and rejected by the Eighth Circuit Court of Appeals.

2. Statement of Facts

The Petition contains a number of misstatements of fact. The position of Petitioner in the matter now before the Court, and the position of the Petitioner before the Eighth Circuit Court of Appeals, simply put, was that the district court erred in not believing her.

It is clear that the district court reviewed all of the evidence before it, listened carefully to the Petitioner's testimony and that of her witnesses (all of whom disagreed with her testimony in large measure), and made specific credibility determinations regarding the matters now raised by her. In fact, the Petitioner herself testified for almost one-half of the trial. While it is clear that plaintiff's factual representations are unsupported by any evidence, or were specifically rejected by the trial court, for the sake of brevity, only a few examples will be addressed here.

The Wackenhut Corporation ("Wackenhut") is a corporation organized and existing under the laws of the State of Florida and is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

The Omaha Public Power District ("OPPD") is a political subdivision of the State of Nebraska and is engaged in the business of providing electrical power. OPPD operates the Fort Calhoun Nuclear Station ("FCNS"), a nuclear power generating facility. In accordance with the strict regulations issued by the Nuclear Regulatory Commission ("NRC"), FCNS must be protected by a highly trained security force.

In December of 1988, OPPD and Wackenhut entered into a contract under which Wackenhut was to begin providing nuclear security services at OPPD's FCNS. Under the terms of the contract, Wackenhut was responsible for furnishing, among other things, the labor, and the supervision and training of that labor, within the guidelines of the NRC. During all times pertinent to this action, the security force at FCNS was comprised both of Wackenhut guards and of guards still employed by OPPD.

Wackenhut began its security operations at FCNS in February of 1989. Petitioner began her nuclear security training in February of 1989. She was in training for one month and worked on site at FCNS from only March 6, 1989 through April 6, 1989. Petitioner was an active security guard at FCNS for a total of only sixteen days.

On April 6, 1989, Petitioner was denied access to the FCNS by OPPD because her behavior was in violation of the Fitness for Duty Standards for an armed nuclear security guard under 10 C.F.R § 73; that is, she exhibited aberrant behavior, and became, quite simply, uncontrollable. As a result of that outburst, Petitioner was placed on suspension and was later sent to two different psychologists to determine her ongoing fitness for duty. Both psychologists, who testified at trial, indicated that Petitioner could not continue in her employment as an armed security guard and Petitioner was formally terminated.

Petitioner first interviewed for the security officer job at Wackenhut with Larry Jones (a Wackenhut supervisor on-site at FCNS) in February of 1989. At trial, Petitioner testified that this meeting constituted the first instance of

sexual harassment. Curiously, in the pretrial order, the Petitioner had stipulated that the first act of sexual harassment did not occur until late March of 1989. In any event, Petitioner complained that Mr. Jones had jokingly told a male applicant, in her presence, to "hurry up and get his application in" or he would make the Petitioner a supervisor before the applicant. Petitioner conveniently neglects to tell the Court that Mr. Jones denied that this exchange (which could hardly be classified as harassment) ever took place.

From her hire date of February 5, 1989 until March 6, 1989, Petitioner was in training with other officers, both male and female, who were hired by Wackenhut to work at FCNS. From the outset, Petitioner experienced performance difficulties with the job, and difficulties getting along with both male and female co-employees. After receiving a failing mark on the first and second phase of NGET training (which includes the radiation and contamination section of the training), Petitioner had to be retrained and retested. During this period, Petitioner alleged at trial that she was harassed in a number of ways. Again, this directly contradicted her stipulation in the Pretrial Order that no harassment occurred prior to late March of 1989.

Petitioner alleges that a training officer yelled "old lady" at her on the firing range, an allegation raised for the first time at trial, and an allegation on which Petitioner offered no corroborating evidence. Petitioner also complained of loud noises and yelling during the training sessions, which she testified was bothersome to all trainees, but which she characterized as harassment being directed at her.

On March 6, 1989, after completing approximately four (4) weeks of training, Petitioner and other team members were assigned to perform actual security duties. Petitioner, however, had continuing problems with adequately performing her duties. Of her own volition, Petitioner approached an OPPD supervisor and acknowledged that she still needed more training because she did not feel comfortable with her knowledge of the security doors. On March 8, 1989, *based on Petitioner's request*, she was decertified as a foot patrol and response officer and sent back to training. She was, contrary to her characterization here, given a good deal of help by co-employees in retraining.

As a result of this decertification, and in accordance with Wackenhut's policy, Petitioner's wages were temporarily reduced to the training rate, which she had previously received. Petitioner posits that this pay decrease was sexual harassment. However, the testimony established not only that this was a policy, but also that all other security officers, including males, had their pay reduced to training wage when they were sent back for *individual* retraining. Petitioner also alleged that Mr. Jones, in explaining the temporary change back to the training wage stated that there was no such thing as being "partially pregnant", i.e. that she was either certified as an officer or was a trainee – not both. Again, Petitioner ignores the fact that Mr. Jones denied making this statement.

Petitioner next stated that lewd remarks were made over the intercom referring to a woman's body parts. Although asked repeatedly, Petitioner did not and could not provide any specific instances when a co-worker

talked about body parts, nor was there any corroborating testimony about the other alleged intercom statements. Petitioner also stated that squeaky chair noises were made by males over the intercom. Petitioner could not point to dates, times, or who was involved, nor did she explain why such noises were even considered by her to be harassment.

Petitioner also pointed to a memo which addressed the employees about the use of intercoms and stated that inappropriate language would not be tolerated. There was absolutely no evidence at trial that the language prompting the memo was of a sexual nature, that such language was directed at Petitioner, or that Petitioner had complained about it. Again, Petitioner had stipulated that the harassment about which she complained did not start until late March of 1989. The trial court also found that there was credible evidence that the intercom system was not operational at the times plaintiff had complained about its use.

Petitioner alleges that she was sexually harassed by Hafez Alsharabi, a Wackenhut guard and a former Kuwaiti citizen, who confirmed in a conversation that "yes, women in Kuwait are treated as second class citizens" and "walk behind men." The evidence established that this conversation was simply a factual discussion by Mr. Alsharabi in response to specific questions he had received from both male and female employees, and was not meant to be demeaning in any way.

The only incident which the District Court credited was the so-called cup incident. In a meeting attended by some of the guards, a styrofoam cup was circulated with

a drawing of a stick figure with breasts and some writing on the cup. Although the evidence was never clear as to what exactly appeared on the cup, the district court found that indeed the cup incident had occurred. The district court found, however, that this single incident, was not sufficiently severe or pervasive to rise to the level of sexual harassment under Title VII. Even if it did, the district court found, after listening to all of the evidence, that prompt and effective remedial action was immediately undertaken by both OPPD and Wackenhut.

Petitioner contends that the action taken by OPPD and Wackenhut was not appropriate remedial action, because it allegedly required her to work out the situation on her own. Petitioner again completely mischaracterizes the facts. In fact, a meeting was held at which it was made clear that no harassment would be tolerated by either Wackenhut or OPPD. In fact, Petitioner even testified that, following that meeting, no further harassment occurred because her co-employees "were afraid to lose their jobs."

Petitioner's characterization of the request that she approach her co-workers and try to work out personal problems was completely unrelated to the issue of sexual harassment. Petitioner had a number of problems getting along with co-employees. For example, when she would ask another guard for advice, the guard would give her such advice and she would reject it as being wrong.

Petitioner pointed at trial to a number of other issues which were totally unsupported by the evidence or, if

supported, were not, by any stretch of the imagination, harassment.

For example, the Petitioner was involved in anti-terrorist response training and was placed in a hallway as a guard during a hostage training exercise. Petitioner did not feel that her assignment was important enough and took it upon herself to essentially leave her post in order to find out what everyone else was "up to." She, in fact, was yelled at by a co-worker because of these actions.

Petitioner also points to a circumstance in which a mustache was painted on her identification card. Petitioner once again conveniently omits the fact that mustaches were painted on the I.D. badges of a number of other guards, most of whom were male.

Petitioner also claims that there was graffiti in the men's bathroom of a sexual nature. The only evidence of such graffiti was after Petitioner had been terminated – and that material was immediately removed.

Perhaps the most farfetched is her allegation that OPPD and Wackenhut, as part of this alleged pattern of sexual harassment, deliberately exposed Petitioner to radiation. That allegation is not only ridiculous, but was totally unsupported by *any* evidence at trial.

Following Petitioner's suspension for aberrant behavior, she was sent to two different psychologists, both of whom came to the conclusion that Petitioner could not be an armed security officer at a nuclear power

plant – she was not fit for such duty. Neither psychologist, both of whom were called by Petitioner at trial, indicated that Petitioner's underlying psychological problems had anything to do with the alleged sexual harassment.

Again, Petitioner's ever-expanding allegations regarding sexual harassment were, to the extent that they were communicated at the time of the trial, heard by and analyzed by the trial court who made specific credibility determinations. Petitioner's Petition, in a nutshell, seeks a review of a clearly fact-intensive case which was decided by the trial court and reviewed in detail by the Court of Appeals. There is no reason for this Court to review the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

Generally, certiorari will not be granted to review judgments based solely on questions of fact. The judgment in this case was obviously fact-intensive. Specific credibility determinations, especially those relating to Petitioner, were made by the trial judge. The Petitioner argues that the findings of fact of the district court were clearly erroneous and should have been reversed by the United States Court of Appeals for the Eighth Circuit. She bases this argument (as she based her circuit court appeal) on the simple fact that she does not agree with the findings of the district court, and that, therefore, they must be clearly erroneous. However, the evidence, when viewed in its entirety, clearly supported the findings of the district court, and the affirmance of the Eighth Circuit

Court of Appeals. The Eighth Circuit was required to, and properly did, affirm the district court decision. Petitioner's position that the district court and circuit court opinions "departed from the accepted and usual course of judicial proceedings" is untenable.

Petitioner next mischaracterizes the holding of the district court in an attempt to advance her second basis for granting this Petition; that is, that the district court held that an employer may rely upon the mental state caused by hostile environment sexual harassment to justify a termination. To the contrary, the district court first found that the evidence did not support a claim of hostile environment sexual harassment and that the one incident which the court did credit, that is, the so-called "cup" incident, was promptly and effectively dealt with. Therefore, there having been no sexual harassment, sexual harassment could not have caused the mental condition which led to Petitioner's termination. In addition, the court specifically held, based upon fact testimony and psychological testimony, that Petitioner's termination and the aberrant behavior that led to it, was wholly unrelated to her claims of sexual harassment.

The third question presented under this Petition involves the prompt and effective remedial action taken by Respondents once they learned about the complaints regarding the cup incident. Petitioner again mischaracterizes the evidence indicating that the action taken by Respondents was simply to tell Petitioner to work it out on her own. In fact, the evidence supports, and the trial court found, that both prompt and effective remedial action was taken. The request that Petitioner visit with her co-workers regarding personal problems was wholly

unrelated to the issues of sexual harassment. Therefore, it is clear that the decisions of the trial court and of the court of appeals were factually supported and were based upon clearly established standards for the review of hostile environment sexual harassment cases under Title VII of the Civil Rights Act of 1964.

None of the reasons for the grant of certiorari stated in Sup. Ct. R. 10 are present in this case.

REASONS FOR DENYING THE WRIT

Review on writ of certiorari in this Court is not a matter of right, but a matter of judicial discretion. Sup. Ct. R. 10. Rule 10.1(a) provides, in pertinent part, that review on certiorari may be appropriate in the following circumstances:

> (a) When a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court.

Sup. Ct. R. 10. As will be discussed below, neither the foregoing circumstances or any other circumstances

which would necessitate a review by this Court are present in this case.

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DID NOT DEPART FROM ANY ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, NOR DID IT SANCTION SUCH A DEPARTURE BY THE LOWER COURT.

Petitioner argues that the Eighth Circuit has so departed from the accepted and usual course of judicial proceedings by refusing to reverse the factual findings of the district court which determined that Petitioner had failed to prove that she had been subjected to hostile environment sexual harassment. The fact of the matter is that the Petitioner simply does not agree with the district court's factual findings.

Generally, certiorari will not be granted to review judgments based solely on questions of fact. *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206, 208 (1939). In fact, Petitions which have been granted will be dismissed if it is discovered that the issue involves merely an appreciation of the evidence. *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918). Because the issue in this case is the propriety of the district court's factual findings given the evidence presented at trial, this case is not an appropriate one for exercise of this Court's discretionary review.

The district court found, after hearing the evidence presented at trial and making the necessary credibility

determinations, that Petitioner failed to prove that she had been subjected to sexual harassment. The one incident that the court found to have occurred, the "cup incident," was not sufficiently severe and pervasive to create a hostile working environment. Thus, the district court found that Petitioner was not sexually harassed nor did her discharge have anything to do with her gender. These findings were made in the context of the standards set forth in *Harris v. Forklift Sys., Inc.*, ___ U.S. ___, 114 S. Ct. 367 (1993), and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

The court of appeals affirmed the findings of the district court, applying the clearly erroneous standard in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). As this Court held in *Anderson*, "a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573. In *Anderson*, this Court reversed the decision of the court of appeals, which had reversed the decision of the district court finding that discrimination had occurred. This Court determined that the court of appeals had misapplied the clearly erroneous standard.

The clearly erroneous standard does not allow a reviewing court to reverse a lower court's factual findings even if it is convinced that it would have decided the case differently. *Id.* The function of the reviewing court is not to decide factual issues de novo. *Id.* Rather, if the lower court's account of the facts is plausible in light of the record viewed in its entirety, then the reviewing court may not reverse the decision. *Id.* at 574. If there are two

permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Id.* In addition, determinations based on credibility demand even greater deference. *Id.* at 575.

Here, the district court made factual findings and credibility determinations which were supported by the evidence. Petitioner's contention, simply stated, is that, because conflicts exist between her testimony and the facts as ultimately found by the district court, those finding are clearly erroneous. Petitioner has consistently ignored all of the evidence which conflicts with hers, as well as all of her own testimonial inconsistencies, and basically takes the position: "Everyone but Petitioner is a liar."

These differences between the trial court's findings and Petitioner's testimony do not represent any failure on the part of the district court to consider all the evidence; rather, the district court made specific findings of credibility of the witnesses and evidence before it. Petitioner was given every opportunity to tell "her story." In fact, Petitioner testified for almost half of the trial. Moreover, all of the witnesses she called on her behalf contradicted Petitioner's testimony.

The Eighth Circuit, in a discrimination case where the court sits as the trier-of-fact, held: "We are required to give 'due regard' to the trial court's opportunity to judge the credibility of witnesses, Fed. R. Civ. P. 52(a), and we have stated that we will only reverse a decision based on an assessment of credibility in 'exceptional circumstances'." *McDowell v. Safeway Stores, Inc.*, 753 F.2d 716, 717 (8th Cir. 1985), *citing NLRB v. Iowa Beef Processors, Inc.*,

675 F.2d 1004, 1006 (8th Cir. 1982) (holding that findings based on credibility determinations will not be overturned unless they shock the conscience). Petitioner failed to demonstrate any such exceptional circumstance. She argues only that because the district court agreed with one of Petitioner's allegations, "the cup incident," it would be inconsistent not to believe her as to other instances of alleged harassment. In fact, the so-called cup incident is the *only* incident for which Petitioner had any corroborating testimony; although even that testimony was inconsistent.

Petitioner insists that the trial court made faulty findings of credibility and contends that no witness produced either by herself or by Respondents was credible. Petitioner selects pieces of testimony from particular witnesses which she demands the trial court accept as credible and then demands that the trial court reject the remaining testimony of these witnesses.

The Fifth Circuit, in dealing with mushrooming evidence such as that presented here refused to disturb credibility determinations made by a trial court:

> At trial, Carmon raised a plethora of new allegations of sexual harassment. These allegations kept expanding during direct examination, cross examination, and even redirect examination. Eventually, the district court concluded that Carmon was not credible regarding these new allegations.

Carmon v. Lubrizol Corp., 17 F.3d 791, 793 (5th Cir. 1994) (per curiam).

It is this evidence that the district court considered and upon which it based its determination that Petitioner had failed to prove any hostile environment sexual harassment. The Eighth Circuit, in reviewing the district court's findings and the record as a whole correctly determined that the findings of the district court were not clearly erroneous and thus, properly affirmed the decision of the district court. There is certainly no indication that the Eighth Circuit "so far departed from the accepted and usual course of judicial proceedings" or "sanctioned such a departure by the lower court" as to justify this Court's granting certiorari in this case.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS DECIDED A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

The Petitioner's second basis for this Petition is that the lower courts decided a question of federal law which has not been, but should be, settled by this Court. Specifically, Petitioner alleges that the Eighth Circuit, in affirming the district court's decision, held that an employer may rely on an employee's conduct or mental state to justify its actions, when that conduct or mental state was caused by the discrimination of which the employee complains. However, the Petitioner mischaracterizes the lower courts' decisions.

The district court determined that Petitioner's suspension and resulting termination were due to the behavior exhibited by Petitioner which rendered her unfit to

perform her job. Thus, the district court found that Petitioner's gender did not play any part in the decision to suspend or discharge her.

The district court also stated as follows:

> It is important to note that even if the Court concluded that plaintiff was successful in showing that gender played a part in her suspension and subsequent termination, under the rule articulated in *Price Waterhouse*, the Court would be obligated to find for the defendants.

Fred v. Wackenhut Corp., 860 F. Supp. 1401, 1408 (D. Neb. 1995) *citing Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The district court then went on to explain that Petitioner's mental state rendered her unfit under federal regulations to work as an armed security officer in a nuclear power station. Clearly, this mixed-motive finding by the district court is merely dictum given the district court's specific finding that Petitioner had failed to meet her burden of proving hostile environment sexual harassment claim.

Furthermore, even assuming that the district court had rendered a "decision" regarding this issue, in her characterization of the decision made by the district court, Petitioner makes the assumption, unsupported by any evidence, that her conduct and mental state were caused by the alleged sexual harassment. There was no evidence presented which would support such a finding. Indeed, the evidence that was presented, and the findings of the district court with regard to the incidents alleged to have occurred by Petitioner, clearly support the opposite finding, i.e. that Petitioner's mental state existed (and exists) independently of anything that occurred in the

workplace. Thus, the district court clearly *did not* decide that an employer can rely on the conduct or mental state of an employee, caused by discrimination on the part of the employer, to justify actions taken against the employee. What the district court *did* decide, based on psychological testimony, is that Petitioner's conduct and mental state (which were unrelated to her claims) justified her immediate suspension and later termination.

Petitioner also argues that the district court, and the Eighth Circuit in affirming the decision of the district court, erred in holding that the Respondents took prompt and effective remedial action after Petitioner complained of alleged sexual harassment. This argument is contrary to the evidence presented in this case. Upon learning of Petitioner's complaint, Respondents held a meeting after the cup incident and issued a memorandum to her co-workers in which it was clearly stated that any harassment was to cease immediately and would not be tolerated. There was no credible evidence presented which would support a finding that any alleged harassment (again, none but the "cup" was credited) continued after the meeting. Clearly, Respondents took appropriate steps to address the concerns of Petitioner regarding alleged sexual harassment and the district court so found based on the evidence presented.

Petitioner's allegation that the remedial action amounted only to a request that she handle the situation is unsupported by the record. The request that Petitioner communicate with her co-workers was unrelated to her complaints of alleged sexual harassment.

CONCLUSION

The only issue in this case is the propriety of the factual findings made by the district court in a case where it was the fact finder. The district court and the court of appeals analyzed this case in the context of *Meritor* and *Harris*, and made specific findings based thereon. It is clear that factual findings cannot be reversed by a reviewing court unless they are clearly erroneous. The Eighth Circuit correctly applied this clearly erroneous standard and affirmed the decision of the district court.

The decision of the Eighth Circuit does not, in any way, depart from the usual and standard course of judicial proceedings so as to justify this Court's exercise of its discretionary power of review. Rather, it comports in all respects with the standards that the court was required to follow.

In addition, contrary to Petitioner's position, no decision of federal law was made which has not been, but should be, settled by this Court.

Therefore, Respondent OPPD respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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